In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1106

T. FRANK SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ORDER BELOW

The order of the Court of Claims (Pet. App. 1a; R. 26) is not reported.

JURISDICTION

The order of the Court of Claims was entered on February 14, 1964 (Pet. App. 1a; R. 26). The petition for a writ of certiorari was filed on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's action for back pay, instituted more than five years after the Civil Service Commis-

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sion had upheld his dismissal from his Civil Service position, is barred by laches.

STATEMENT

On November 16, 1956, petitioner, then a Cotton Classer in the Department of Agriculture at a salary of $8,645 per year, was furnished a statement of reasons for a rating of unsatisfactory performance and prospective separation, demotion or reassignment (R. 1–2, 6–7). Petitioner filed an appeal under the department's regulations. On March 21, 1957, the department sustained the rating and notified petitioner that he would be separated from the rolls as of April 24, 1957, and he was so separated (R. 2, 6–7).

On April 8, 1957, petitioner noted an appeal to the Eighth Region, Civil Service Commission (R. 2, 7). The Statutory Board of Review, after a hearing, held on June 18, 1957, sustained the rating. On August 9, 1957, the Eighth Region issued its decision affirming the department's separation action and refusing to review the adequacy and validity of the department's stated reasons for the unsatisfactory rating (R. 2, 7). On August 15, 1957, petitioner appealed the Eighth Region's decision (R. 3, 7), and on October 18, 1957, the Board of Appeals and Review of the Civil Service Commission denied the appeal (R. 3, 7).

On several occasions after July 28, 1960, petitioner requested the Commission to reopen and reconsider the decision. The Commission, in letters dated January 5, 1961, and March 13, 1962, refused (R. 3, 7–8).

Prior to the instant proceeding to recover back pay, brought in the Court of Claims on November 5, 1962 (R. 1), petitioner filed no judicial proceedings to challenge the Commission's decision of October 18, 1957.

On the government's motion, the Court of Claims entered an order dismissing the action on the ground of laches (Pet. App. 1a; R. 26).

ARGUMENT

The decision below, holding petitioner's claim barred because of his five year delay in filing suit, is plainly correct. It follows principles established by this Court in *Arant* v. *Lane*, 249 U.S. 367, and consistently applied since then. There is no occasion for further review of these principles or their application to the present case.

As already noted, petitioner was separated from his employment with the Department of Agriculture on April 24, 1957, after a notice of unsatisfactory performance on November 16, 1956. A series of administrative appeals culminated, on October 18, 1957, in an order by the Board of Appeals and Review of the Civil Service Commission, denying petitioner relief. Nevertheless, petitioner took no further action until November 5, 1962, more than five years after the administrative decision.

Since petitioner seeks back pay from the date of his separation, this delay has clearly prejudiced the government. Regard for the public purse requires an employee to pursue his claim diligently, or his remedy will be lost even where serious procedural and substantive irregularities are alleged. *Arant* v. *Lane*,

249 U.S. 367 (22 months' delay); *Drown* v. *Higley,* 244 F. 2d 774 (C.A.D.C.) (over two years' delay).

As the cases indicate, much shorter intervals than the five-year period involved here have consistently been held to bar subsequent litigation. *Arant* v. *Lane,* 249 U.S. 367 (22 months); *Bovard* v. *United States,* C. Cls. 241–60, February 6, 1963 (14 months after an intervening district court suit and 54 months after exhausting administrative remedies); *Morse* v. *United States;* 59 C. Cls. 139, 155 (14 months); *Grasse* v. *Snyder,* 192 F. 2d 35 (C.A.D.C.) (16 months); *Drown* v. *Higley,* 244 F. 2d 774 (C.A.D.C.) (over 2 years); *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (33 months); *Plunkett* v. *United States,* 58 C. Cls. 359, 370 (37 months); *Evans* v. *Leedom,* 265 F. 2d 125 (C.A.D.C.), certiorari denied, 361 U.S. 935 (38 months).

Petitioner's delay is not excused, of course, by the fact of intervening correspondence with the Civil Service Commission. This is especially so since petitioner did not commence writing to the Commission until July 28, 1960, more than 33 months after the decision of October 18, 1957, and five months after the decision in *Chisholm* v. *United States,* 149 C. Cls. 8, from which he claims support. But in any event, as stated in *Jones* v. *Summerfield,* 265 F. 2d 124, 125 (C.A.D.C.), certiorari denied, 361 U.S. 841:

> His suit was not brought in a proper forum until thirty-three months had elapsed after his discharge, and some 17 months after the decision in Cole v. Young. The letters to various admin-

istrative officials do not excuse his delay in bringing suit [citing authorities].

See also, *Evans* v. *Leedom*, 265 F. 2d 125 (C.A.D.C.); *Davis* v. *Tennessee Valley Authority*, 214 F. Supp. 229 (N.D. Ala.), affirmed, 313 F. 2d 959 (C.A. 5), certiorari denied, 375 U.S. 818.

In the circumstances it seems plain that the court below properly held the present claim barred by laches.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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